United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig. w/ affidavit of mailing

75-1132

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Pgs

To be argued by
RONALD E. DE PETRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1132

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH RACKER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
RONALD E. DE PETRIS,
Assistant United States Attorneys,
Of Counsel.

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UNITED STATES OF AMERICA,

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BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Joseph Racker appeals from a judgment of the United States District Court for the Eastern District of New York (Jack B. Weinstein, *J.*) entered on March 21, 1975, after a plea of guilty and a hearing before the district court, which judgment convicted Racker of conspiracy and five substantive offenses in violation of 18 U.S.C. § 371 and 41 U.S.C. §§ 51, 54.

The 43 count indictment herein charged appellant, the only named defendant, with a scheme involving the payment of kickbacks by him on behalf of a subcontractor, U.S. Electronic Publications, to employees of a prime contractor, Grumman Aerospace Corporation. The indictment consisted of six conspiracy counts (each involving a different employee of Grumman) and 37 substantive counts.

On January 21, 1975 appellant pled guilty to one conspiracy count and five substantive counts in the indictment

(counts 1, 4, 10, 16, 19 and 36 respectively). With the consent of the United States and Judge Weinstein, appellant reserved the right "to raise at a hearing before the District Court and on appeal the issue as to whether the requisite prime contracts between Grumman Aerospace Corporation and the Department of the Navy were 'negotiated' within the meaning of Title 41, United States Code, Sections 51-54".

The hearing was held before the district court on March 14 and 21, 1975. At the conclusion of the hearing, the district court found that the evidence established beyond a reasonable doubt that the requisite prime contracts were "negotiated" and, accordingly, denied appellant's motion to dismiss the indictment.

The district court then sentenced appellant to a fine of $10,000 on each of the six counts to run consecutively, totalling $60,000. The district court further sentenced appellant to a term of imprisonment of two years on each count to run concurrently; the district court directed appellant to serve six months of that term at a community treatment center, suspended the balance of the term, and placed him on unsupervised probation for one and a half years. On motion of the Assistant U.S. Attorney, the remaining counts of the indictment were dismissed. Execution of the sentence was stayed and appellant is free on a personal recognizance bond pending this appeal.

Racker appeals, claiming (1) that the requisite prime contracts were not "negotiated" within the meaning of the relevant statute; (2) that appellant was improperly denied his right to a jury trial on this issue; and (3) that the district court erred in quashing appellant's subpoena directed to the United States Navy in connection with the hearing on this issue.

Statement of Facts

(1)

Joseph Racker was the President of U.S. Electronics Publications (hereinafter "USEP"). USEP was a subcontractor of Grumman Aerospace Corporation (hereinafter "Grumman"). The instant case involves USEP's preparation of technical manuals required by Grumman for the performance of its prime contracts with the United States Navy. According to the conspiracy count as to which appellant pled guilty, over a four year period Racker conspired to pay kickbacks to an employee of Grumman. In furtherance of the conspiracy, Racker assisted this employee in the formation of a company and caused false invoices of that company to be prepared in order to cover the illegal kickbacks. According to the substantive counts of the indictment as to which appellant pleaded guilty, Racker paid kickbacks to this employee and four other Grumman employees over a three year period. These kickbacks ranged from $1,300 to $1,700, and were paid on behalf of USEP as an inducement for the award of subcontracts from Grumman and as an acknowledgement of subcontracts previously awarded by Grumman to USEP (A. 1-3, 5, 7-8, 11, 13, 22).*

The various subcontracts referred to in the indictment were awarded by Grumman to USEP under a total of ten production contracts between Grumman and the Navy (A. 98-100). These production contracts involved various models of aircraft, including models E-2C, A-6A, A-6E, KA-6D, and EA-6B, and technical manuals related thereto (A. 105-112). These contracts were entered into during the years 1967 through 1971 (A. 134-150, 112; Ex. 1-10).

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* References to the appendix are preceded by "A". References to the exhibits are preceded by "Ex".

The aircraft involved in these ten production contracts were modifications of the original aircraft models A-6 and E-2 (A. 177-179, 182, 201-207, 217-220). Design contracts providing for the initial research and development of these model aircraft had been entered into between Grumman and the Navy in 1958 and 1957 respectively (Ex. 11, 13).

A hearing was held before the district court on March 14 and 21, 1975 concerning whether or not these contracts were "negotiated" within the meaning of the relevant statute.

(2)

Ellsworth Baker, deputy contract director for Grumman, and Erling Nelson, Esq., deputy counsel for Naval Air Systems Command, Navy Department, testified at the hearing. Baker had been employed by Grumman since 1955. Among his duties was the representation of Grumman in contract negotiations with the government, including the Navy. In this regard Baker was familiar with the government's procurement statutes, regulations and directives (A. 103-104, 113-117). Indeed, the district court found that he was "an expert in negotiations with the Government on contracts" (A. 117). Nelson had been employed by the Department of the Navy since 1956. He was also familiar with the procurement activities and statutes concerning naval aircraft. Indeed, he was now the "No. 2 man" in the Navy Department concerning procurement of naval aircraft (A. 194-195).

The testimony of Nelson and Baker established the contract procedures used by the government to procure the design and production of aircraft, and related services and materials.

When the Navy has determined its aircraft requirements, it issues an Operational Directive broadly defining the kind of aircraft needed. A solicitation notice contain-

ing a general description of the basic requirements is then published in the Commerce Business Daily. The Operational Directive and other documentation pertaining to the aircraft are made available to the aircraft industry. Depending on the confidentiality involved, the material is either mailed to or picked up by companies showing an interest in competing for the design contract (A. 196-198, 152-154). The interested companies then submit their design proposals. After the various proposals are evaluated, the Navy awards the design contract on a competitive basis to the company submitting the best proposal. This contract is usually a cost plus fixed fee contract for the design and development of the aircraft, and usually includes two or three prototype aircraft (A. 203, 209, 213, 179).

The prototype aircraft are then tested to determine whether they satisfactorily perform the desired function. If these aircraft are found to be satisfactory, the Navy then proceeds to enter into a contract for the production of the particular model aircraft. Assuming that the design contract has been successfully performed, the Navy usually awards the production contract to the company that designed the aircraft. This award is usually made on a sole source basis because of the know-how which that company has acquired as a result of designing the aircraft. However, the production contract is not part of the design contract, but is a separate contract (A. 209-211, 215-216, 219, 179, 182-185). The contract is usually either a fixed price or an incentive price contract. Under the latter type of contract there is a target price, subject to adjustment up or down depending on the actual cost of performance of the contract. The incentive is as to the cost, with the contract parties sharing in specified percentages of the difference between the target price and the actual cost (A. 123-128, 144-145).

(3)

Both the design contracts and the production contracts between the Navy and a particular aircraft company are considered in the industry to be "prime" contracts (A. 117-118, 217, 220, 221). These prime contracts may be procured either by negotiation or by formal advertising. As used in the industry, these terms are clearly distinguishable and have a specific meaning. That meaning is set forth and defined in the Armed Services Procurement Act, 10 U.S.C. §§ 2302, 2305, and the Armed Services Procurement Regulations, 32 C.F.R. Parts 2 and 3 (A. 219, 128-131).* Formal advertising presupposes that there will be competition; negotiation is possible without competition. However, in both procedures procurement is to be made "on a competitive basis to the maximum practicable extent" (A. 220-221; 32 C.F.R. § 1.300-1). Procurement of a contract by negotiation cannot be done unless the Navy has made a finding and determination setting forth the basis for proceeding by negotiation instead of formal advertising (A. 208, 225-226; 10 U.S.C. §§ 2304, 2310).

Design contracts for aircraft are almost invariably negotiated on a competitive basis (A. 217, 179). Production contracts for aircraft are almost invariably procured by negotiation on a sole source basis (A. 171, 220).

Based upon their knowledge and experience and an examination of the contracts, the two expert witnesses testi-

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* In the addendum attached hereto, there is set forth § 3.2 of Navy Contract Law (2d Ed. 1959), entitled "Negotiation Distinguished From Advertising". It provides an excellent introductory discussion of the distinction between the two forms of procedure. Essentially the distinction between the two lies in the formal procedures and rather rigid rules for procurement which must be followed when proceeding by formal advertising (e.g.: submission of sealed bids and public opening of bids) as distinguished from negotiation.

fied concerning the method by which the design and production contracts herein were procured. The design contracts for the A-6 and E-2 model aircraft were procured by competitive negotiation (A. 217-218). The ten production contracts were separate contracts from the design contracts, and were procured by negotiation on a sole source basis (A. 219, 131, 171, 182-185). Indeed, to the knowledge of these two expert witnesses, the Navy had never entered into a contract with Grumman for the production of aircraft by formal advertising (A. 220, 171). This is not surprising, considering the complexity and tremendous cost of the aircraft programs involved herein, ranging in the billions of dollars (A. 179-180).

Further, the face page of the two initial design contracts and the ten production contracts indicated that they had been procured by negotiation (Ex. 11, 13, 1-10). Under item 13 on the face of the production contracts there appeared the following (Ex. 1-10):

> This procurement was [ ] Advertised [x] Negotiated pursuant to [x] 10 U.S.C. 2304(a)( )*
> [ ] 41 U.S.C. 252(c)( ).

On the face sheet of the two initial design contracts contained in the various papers relating to these design contracts which make up Ex. 11 and 13 there appeared at the top "Negotiated Contract", and at the bottom:

> This negotiated contract is entered into pursuant to the provisions of 10 U.S.C. 2304(a)(11) and any

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* The parenthesis—2304(a)( )—was completed on each contract with the subdivision of § 2304(a) (either (10) or (14)) setting forth the statutory exception to the general requirement of formal advertising under which the particular contract was negotiated.

required determination and findings have been made.*

(4)

At the conclusion of the hearing Judge Weinstein found that the evidence established beyond a reasonable doubt that the production contracts were "negotiated". Although the district court held that the status of the design contracts was irrelevant, it also found that the design contracts were "negotiated" beyond a reasonable doubt. The district court further found beyond a reasonable doubt that the production contracts were separate and independent contracts. Accordingly, it held that the subcontracts involving appellant were issued under "negotiated contracts" (A. 230-231).

ARGUMENT

POINT I

The requisite prime contracts were "negotiated" within the meaning of 41 U.S.C. §§ 51-54.

(1)

An essential element of the crime of paying a kickback in violation of 41 U.S.C. §§ 51-54 is that the requisite prime contract be of a kind covered by the statute. *Howard* v. *United States*, 345 F.2d 126, 129 (1st Cir.), *cert. denied*, 382 U.S. 838 (1965); *United States* v. *Barnard*, 255 F.2d 583, 588 (10th Cir.), *cert. denied*, 358 U.S. 919 (1958). Accord-

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* The quoted language is taken from Ex. 11. Ex. 13 has the same language, except that the statutory exception permitting negotiation is cited as "Section 2(c)(11) of the Armed Services Procurement Act of 1947 (Public Law 413, 80th Congress)" instead of being cited to the Act as codified in the United States Code.

ingly, the United States was required to prove beyond a reasonable doubt that the requisite prime contracts were "negotiated" within the meaning of the statute. Section 52 defines the term. It provides in pertinent part that "the term 'negotiated contract' means made without formal advertising."

The term "formal advertising" is not defined in the provisions of the statute prohibiting payment of kickbacks. However, the meaning of both terms is set forth in the Armed Services Procurement Act. 10 U.S.C. § 2302 defines the term "negotiate" as meaning "make without formal advertising", and the term "formal advertising" as meaning "advertising as prescribed by section 2305 of this title". The procedures invloved in formal advertising are set forth in 10 U.S.C. § 2305. The procedures involved in negotiation and formal advertising are further specified in the Armed Services Procurement Regulations, 32 C.F.R. Parts 2 and 3. Formal advertising is therein defined as follows (32 C.F.R. § 2.101):

> §*2.101 Meaning of formal advertising.*
>
> Formal advertising means procurement by competitive bids and awards as prescribed in this section, and involves the following basic steps:
>
> (a) Preparation of the invitation for bids, describing the requirements of the Government clearly, accurately, and completely, but avoiding unnecessarily restrictive specifications or requirements which might unduly limit the number of bidders. The term 'invitation for bids' means the complete assembly of related documents (whether attached or incorporated by reference) furnished prospective bidders for the purpose of bidding;
>
> (b) Publicizing the invitation for bids, through distribution to prospective bidders, posting in public places, and such other means as may be appropriate,

in sufficient time to enable prospective bidders to prepare and submit bids before the time set for public opening;

(c) Submission of bids by prospective contractors, and

(d) Awarding the contract, after the bids are publicly opened to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered.

See also 32 C.F.R. § 3.101, entitled "Negotiation as distinguished from formal advertising."

Under this meaning of the terms negotiation and formal advertising, which is their meaning as understood in the aerospace industry (A. 219, 128-131), there is no real dispute on this appeal of the fact that the production contracts and design contracts were negotiated. As the district court noted, the regulations, the contracts themselves, and the testimony of the two expert witnesses are "in full agreement on these points" (A. 230). See also the statement of facts herein.

Rather appellant makes a three-pronged attack with respect to the *meaning* of these terms (negotiation and formal advertising) under the applicable criminal statute (41 U.S.C. §§ 51-54). Appellant suggests other definitions for these terms, and claims that using those definitions the requisite prime contracts were not "negotiated". Alternatively, based upon a claimed vagueness as to the meaning of these terms, appellant contends that the criminal statute is thereby rendered unconstitutional. Finally, even assuming that the contracts were in fact negotiated, appellant claims that the applicable law was not complied with, thereby rendering the contracts void or at least voidable and

preventing any prosecution thereunder. As will be shown below, these contentions fly in the face of a simple and direct application of a well-understood statute in the aerospace industry, and are utterly frivolous.

(2)

Appellant contends that as used in 41 U.S.C. §§ 51-54 "'formal advertising' means the normal competitive process to allow government procurement at the lowest possible price" (brief, p. 26). Appellant recognizes that even under this definition the ten production contracts were not procured by formal advertising (they were procured on a sole source basis). Hence, appellant is forced further to contend in a rather inventive syllogism that the production contracts were modifications or amendments of the initial design contracts, that the character of the design contracts governs the determination herein as to whether the requisite prime contracts were negotiated, and that since the initial design contracts were procured on a competitive basis they were formally advertised and not negotiated under appellant's definitions of these terms.

However, competition is simply not the distinguishing factor between procurement by negotiation and by formal advertising. Under both procedures it is the goal of the government to have competition (A. 220-221). Indeed, the Armed Services Procurement Regulations, in discussing competition, state (32 C.F.R. § 1.300-1):

> All procurements, whether by formal advertising or by negotiation, shall be made on a competitive basis to the maximum practicable extent.

Appellant's reliance on the legislative history, consisting of the House report and letters made a part thereof, at the time Congress amended the statute in 1960 to cover

"negotiated contracts" is misplaced. See *1960 U.S. Code Cong. and Adm. News*, 3292 et seq. The legislative history does recognize that the normal competitive processes are utilized in formal advertising (p. 3296). However, it recognizes that competition is also utilized in negotiation, although it may not always be effective, full and free competition (pp. 3295, 3296). It describes the situation when negotiation is used (p. 3295):

> Negotiated procurements are generally used where the product involved is one not usually found on the commercial market, and where there may not be effective competition. In such case, there is generally no opportunity to compare going prices with the price negotiated by the Government, which makes this type of contract more susceptible to kickbacks.

This statement in the legislative history describes the exact situation present with regard to both the design and production contracts for aircraft involved herein. Further, a reading of the legislative history reveals that Congress was aware of the procurement procedures, statute, and regulations used by the government.* Surely the intent of Congress as to the meaning of negotiation and formal advertising is that meaning long recognized in the industry and long set forth in the procurement act and regulations.

Moreover, the evidence clearly established that the production contracts were separate contracts (A. 219, 182-185). Hence the character of the production contracts, under

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* Indeed, at p. 3295 there is specific reference to the Air Force procurement instruction and the numerous types of negotiated contracts employed in procurements. At pp. 3296 and 3299 there is specific reference to the Armed Services Procurement Act and the Armed Services Procurement Regulations respectively.

which the subcontracts herein were issued, controls the determination of the issue raised herein.

That the production contracts constitute the requisite prime contracts on the issue herein is further supported by the legislative history.* The House report states that the act is amended to apply to "*all types* of negotiated Government contracts" (p. 3292) (emphasis supplied). A letter from the Comptroller General of the United States addressed to the Speaker of the House, which letter was made part of the House report, stated in part (p. 3293):

> The General Accounting Office, in auditing certain World War II cost-plus-a-fixed-fee contracts, found the existence of conditions involving the payment by certain firms of commissions or fees to persons employed in the purchasing departments of prime contractors who were performing cost-plus-a-fixed-fee contracts for the Government, for the purpose of obtaining subcontracts or orders from the prime contractor. The Government ultimately bore the costs of the kickbacks because under the terms of the prime contract, it was required to reimburse the contractor for the cost of all subcontracts.

The letter went on to note that "since the passage of the act, new types of negotiated contracts have been devised to meet the specialized and complex procurement problems of the Government . . ." (p. 3294), and concluded as follows (p. 3296):

> We are satisfied that enactment of the Anti-Kickback Act of 1946 has had a salutary and strong deterrent effect against commercial bribery and the

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* Even assuming that the production contracts constituted contract amendments or supplemental agreements, each would still constitute a "contract". See the definition of a contract in the Armed Services Procurement Regulations (32 C.F.R. § 1.201-4), which includes amendments and supplemental agreements.

> payment of kickbacks under the cost reimbursable type contracts which the statute was specifically designed to cover. We further feel that the conditions which the act was designed to cover could arise as well under the extended methods of contracting now employed by the Government, as above referred to. For this reason we believe that it is essential to the protection of the best interests of the Government to extend the legislation to cover these types of contracts. Consequently, we strongly recommend early action by the Congress to amend the Anti-Kickback Act of 1946 to extend the provisions thereof to all negotiated contracts.

The legislative history clearly indicates that the prime contract which Congress was referring to is the prime contract under which the subcontract was issued on which the kickback was paid—the prime contract under which the Government would ultimately bear the cost of the kickback. See also *United States* v. *Dobar*, 223 F. Supp. 8, 10-11 (M.D. Fla. 1963). In this case that prime contract is clearly the production contract, not the design contract. Thus even under appellant's definitions, in which the production contracts were negotiated and the design contracts were not, the requisite prime contracts were negotiated.

Moreover, reasoning by analogy from *United States* v. *Barnard, supra*, further supports our position herein. In that case the defendants contended that the prime contract was a fixed price contract, not a "cost-plus-a-fixed-fee or other cost reimbursable basis" contract within the meaning of the then—applicable statutory language. Upon considering all the provisions of the contract, the Court found that it partook of both aspects—it was in substance and effect a fixed price and other reimbursable basis contract. The Court held that since it partook in part of an "other reimbursable basis contract", it fell within the range of the statute. In the case at bar, in which under appellant's

position the production contracts were part of the design contracts, and the production contracts were negotiated and the design contracts were not, the contracts partook of both aspects. Accordingly, partaking in part of "negotiated contracts", the contracts fall within the coverage of the statute.

(3)

Appellant's contention that the failure of the statute to define "formal advertising" renders it unconstitutionally vague has largely been disproved by the prior discussion herein. As already noted, the terms negotiation and formal advertising have a well-understood meaning in the industry. Cf. *United States* v. *Hanis*, 246 F.2d 781, 788 (8th Cir. 1957). The procedures have long been set forth in the procurement statute and regulations.* The statute clearly gave fair notice to appellant that his contemplated conduct in paying kickbacks on subcontracts under the prime contracts involved herein was forbidden by the statute. See *United States* v. *Persky*, — F.2d — (2d Cir. June 18, 1975, slip op. 4091, at 4097-4099).**

(4)

Finally, appellant attacks the validity of the production contracts and the design contracts, contending that the ap-

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* Contrary to the implication on p. 18 of appellant's brief, the term "formal advertising" is not defined differently throughout the United States Code, the Code of Federal Regulations, and the various agencies of the government. 10 U.S.C. § 2271 does not purport to define "formal advertising". The Federal Procurement Regulations (applicable to the various civilian agencies of the government) and the Armed Services Procurement Regulations (applicable to the Department of Defense, including the Army, Navy, and Air Force) both define the term "formal advertising" in almost exactly the same language (41 C.F.R. § 1-2.101 and 32 C.F.R. § 2.101 respectively).

** It might be noted in passing that knowledge of the character of the prime contract is not an essential element of the crime. *United States* v. *Hanis*, *supra*, 246 F.2d at 788.

plicable law was not complied with. As to the production contracts, appellant contends that the United States failed to prove that the determination and findings authorizing negotiation required by 10 U.S.C. § 2310 were made (brief, pp. 22-24). As to the design contracts, appellant contends that the Navy erroneously followed the procedures set forth in 10 U.S.C. § 2301 et seq. rather than those set forth in 10 U.S.C. § 2271 (brief, pp. 20-22). Appellant apparently further contends as to the design contracts that the procurement was not made on a competitive basis to the maximum practicable extent (brief, pp. 24-25). Based upon the premise that the contracts are invalid, appellant apparently concludes that the requisite prime contracts were not "negotiated" within the meaning of the statute and that he cannot be convicted of paying kickbacks on subcontracts under the invalid prime contracts.*

Most importantly, and particularly in light of the long-standing public policy against kickbacks, see *United States* v. *Perry*, 431 F.2d 1020, 1024 (9th Cir. 1970), the validity of the prime contracts is irrelevant to, and is not an essential element of, the crime of paying kickbacks charged herein. It is not a defense to that crime that the prime contracts under which the subcontracts were awarded were invalid. See *United States* v. *Knox*, 396 U.S. 77 (1969) (validity of government's statutory demand for information in tax forms not an element of crime of making false statements therein); *Bryson* v. *United States*, 396 U.S. 64 (1969) (constitutionality of statute requiring defendant to make a statement legally irrelevant to validity of conviction for making false statements thereunder).

Further, appellant's premise also must fall. As to the failure to introduce in evidence the written determination

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* Without any supporting authority appellant baldly claims that "one of the essential elements is to show the statute was specifically followed" (brief, p. 23).

and findings authorizing negotiation of the production contracts, it need only be pointed out that a presumption of regularity attaches to official proceedings and acts. See 9 Wigmore, *Evidence*, § 2534 (3d Ed. 1940); McCormick, *Evidence*, § 343 at p. 807 (Cleary Ed. 1972). Appellant did not make this attack on the validity of the contract below (A. 228-229).*

Appellant's contentions as to the design contracts, dubious at best, need not be resolved here. For, as noted *supra* at pp. 12-14, the character of the design contracts is irrelevant herein. Moreover, appellant below did not attack the validity of the design contracts (A. 228-229). Indeed, when the very matter now pointed to arose below (A. 198-201), counsel for appellant questioning the witness Nelson stated that "I don't ascribe any illegality to the Government or Navy or Mr. Nelson and I want the record to be clear on that" (A. 200). Hence the United States did not establish a record on these contentions below.

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* Indeed, the determination and findings were available to appellant below, having been marked for identification as government exhibits 1A-10A. When the United States initially offered them in evidence, defense counsel objected on the ground that no foundation as to their authenticity had been made (A. 101-102, 172-174). Neither side thereafter offered them into evidence.

POINT II

Appellant waived his right to a jury trial herein.

On January 21, 1975 appellant pled guilty to six counts of the instant indictment. At that time, with the consent of the United States and Judge Weinstein, appellant reserved the right "to raise at a hearing before the District Court and on appeal the issue as to whether the requisite prime contracts between Grumman Aerospace Corporation and the Department of the Navy were 'negotiated' within the meaning of Title 41, United States Code, Sections 51-54" (A. 59-60, 27). See *United States* v. *Burke*, — F.2d — (2d Cir. May 15, 1975, slip op. 3571, at 3572-3573), and cases cited therein.

Thereafter, at the opening of the hearing on March 14, 1975, appellant made a demand for a jury trial on that issue. The district court properly ruled that by pleading guilty appellant had waived his constitutional right to a jury trial (A. 81-83). However, appellant contends that the reservation of the right to the hearing preserved his right to a jury trial.

Under the procedure involved herein a reservation of any right, and the consents by the prosecutor and trial court thereto, must be clearly stated in writing or on the record. They cannot be left to equivocal inference. See *United States* v. *Mann*, 451 F.2d 346 (2d Cir. 1971). It is clear from the record herein not only that the reservation of rights herein did not include the right to a jury trial, but also that there was no intent to reserve that right on the part of appellant, the prosecutor, and the trial court.

First, the language of the agreement reserved the right to a *hearing before the district court* on the issue, not to a *trial before the district court and a jury* on the issue.

Second, in advising appellant at the time of the plea of the constitutional rights he waives by pleading guilty, the district court specifically referred to a jury trial (A. 55-56). Indeed, when the district court asked appellant's counsel whether appellant understood "all the constitutional rights he waives", counsel responded, "Yes, we have gone through with him at very great length" (A. 56).

Finally, the discussion at the time the right to a hearing was reserved and later during argument on a motion to quash subpoenas heard two days before the hearing herein make it clear that no jury trial was contemplated. On the former occasion the prosecutor referred to a ruling by the district court on the issue reserved ("your Honor's ruling", A. 60). On the latter occasion the district court, referring to the issue as to whether the requisite prime contracts were negotiated, stated, "it's not a jury issue" (A. 74). When these statements were made, neither appellant nor appellant's counsel disputed the clear understanding embodied in the statements that no jury trial was contemplated.

POINT III

The district court properly quashed appellant's subpoena.

Prior to the hearing appellant issued a subpoena directed to the Secretary of the Navy seeking the production of various documents and records relating to the design contracts involved herein (A. 41). Upon the motion of the United States to quash the subpoena on the ground that it was burdensome and irrelevant, and after hearing argument on the question, the district court quashed the subpoena against the Navy, with leave to renew after the hearing. It directed Grumman to bring in the design contracts themselves, and any other materials relating thereto which it had (A. 62-74).

Grumman produced the design contracts at the hearing (Ex. 11-13; A. 177-186). Appellant renewed his application for the documents involving the solicitation and advertisements which preceded the awarding of the design contracts. Regarding the advertisements in the Commerce Business Daily, the district court indicated that they were public documents available in libraries in the Metropolitan New York area. Regarding the other pre-contract documents, the district court indicated that the Navy witness Nelson should bring what was convenient, but would not be required to strip the warehouses of Washington.* The matter was adjourned for one week (A. 188-189). After Nelson appeared and testified the following week, appellant introduced the design contracts in evidence and then rested its case, without renewing its application for the documents preceding the design contracts (A. 226-228).

The district court properly resolved the matter. In light of the burden it would impose on the Navy, the district court properly refused to require the Navy to produce documents which preceded the award of the design contracts unless and until it appeared at the hearing that they were relevant. At the hearing it became crystal clear that these documents were not relevant to the issue raised therein.

First, as noted *supra* at pp. 12-14, the character of the production contracts governs the issue involved herein. The design contracts are not the requisite prime contracts under the applicable statute. Moreover, even if they were, these pre-contract documents would still only be relevant in an endeavor to prove that the design contracts were procured by the use of the normal competitive process—thus relevant only if appellant's definition of formal advertising were

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* The documents sought would go as far back as the 1950's. If still in existence, they would have been in storage in Washington (A. 67, 70, 74).

adopted. As shown *supra* at pp. 9-12, there is no real dispute that even the design contracts were negotiated under the meaning as used in the industry and set forth in the procurement act and regulations; that meaning is the appropriate one under the applicable criminal statute.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: June 27, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
RONALD E. DE PETRIS,
Assistant United States Attorneys,
*Of Counsel.**

* We wish to acknowledge the assistance of Marc D. Teitelbaum, a third year law student at New York University Law School, in the preparation of this brief.

ADDENDUM

I. NEGOTIATION AS DISTINGUISHED FROM ADVERTISING

§ 3.2. Negotiation Distinguished From Advertising

Before considering each circumstance permitting negotiation as enumerated in the Armed Services Procurement Act, it is advisable first to discuss briefly just what negotiation is, what it entails, and how it differs from formal advertising as a particular method to be used for the procurement of supplies and services. As pointed out in Chapter 2, procurement by formal advertising entails the solicitation of bids by the Government, the submission of sealed bids by qualified suppliers, the public opening at a set hour and the recording of bids by the Government, and the awarding of a contract by the Government "to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered." In connection with these four main steps in the process of procuring by means of formal advertising, the emphasis is consistently placed on balancing the interest in speedy and efficient procurement procedures against the interest in the maximum opportunity to compete and the avoidance of favoritism and fraud in the making of public contracts. Only under rare and special conditions may a bid be accepted that takes exception to the invitation for bids or may a bid be changed after the public opening; and only under peculiar circumstances may mistakes or irregularities in bids be rectified. Seldom can such important bargaining factors as quality, price, and business reputation be unrestrictedly considered by the Government's purchasing officer; and seldom can there be any give and take, between buyer and seller, over the inclusion and wording of contract clauses. Each transaction is entered into at arm's length and is carried out with virtually no opportunity for negotiating the deal itself or the particular terms of the deal.

When the Government buys something as a result of negotiation, however, whether under the relatively few

statutory and interpretative exceptions to Rev. Stat. § 3709 or under the circumstances permitting negotiation which are specifically enumerated in the Armed Services Procurement Act, the formal procedures and rather rigid rules for procurement by advertising need not be observed. It is important to remember, however, that there is bargaining and competition when this is feasible; but instead of the mailing or public posting of formal invitations to bid, quotations or proposals (supported by statements of estimated cost or other satisfactory evidence of reasonable price) are requested from qualified sources of supply for the particular supplies or work being procured. Thereafter, on t' e basis of these quotations or proposals, and without any public opening, the contracting officer for the Government negotiates a contract with that supplier or suppliers who offer the best deal to the Government. In this negotiation many different factors are considered and weighed, such as: comparison of prices, and consideration of other prices for supplies and services similar to those which are being procured; negotiation of cost and profit elements in prices quoted; comparison of the business reputations and responsibilities of the various suppliers who submit informal quotations or proposals; considerations of quality, and of the satisfaction of technical requirements; consideration of delivery possibilities, of the extent and nature of expected subcontracting, and of the most favorable type of contract (usually in terms of a fixed-price contract as compared with a contract of the cost-reimbursement type). Individual bargaining is usually conducted by mail or conference; but award may also be made as a result of competitive negotiation without bargaining by accepting the most favorable offer initially received if the contracting officer regards it to be fairly and reasonably priced.[13] In short, with procurement by negotiation the Government is, generally, free, like any other purchaser, to do business with whichever supplier seems to offer the most satisfactory terms.

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[13] The procedures for "competitive negotiation" are set forth in ASPR 3-805 (Sept. 18, 1958).

This privilege or freedom of purchasing supplies and services by means of negotiation is permitted under the Armed Services Procurement Act only to a limited degree. Not only must certain Findings and Determinations often be made in justification of the use of this method of procurement (as will be discussed below), and not only must certain procedural and contracting formalities be observed with this kind of procurement, but also—and fundamentally—must the contemplated purchase fall within one of the categories or kinds of circumstances permitting negotiation specifically set forth in the Armed Services Procurement Act. For it must be constantly remembered that, although the authority of the First War Powers Act of 1941 gave to the Armed Services and also to several other government purchasing agencies a virtually unlimited right to procure by negotiation "across the board," nevertheless under the compromising provisions of the Armed Services Procurement Act, Congress declared that all purchases and contracts for supplies and services for the Armed Services (and also for the United States Coast Guard and the National Aeronautics and Space Administration) must be made by advertising except that such purchases and contracts may be negotiated by anyone of those government agencies without advertising provided the contemplated procurement falls within some one of the circumstances or situations set forth in the act.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 30th day of June, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a 2 cys of Brief for Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Lubkin, Cohen & Stracher, Esqs.
3000 Marcus Avenue
Lake Success, N. Y. 11040

Evelyn Cohen

Sworn to before me this
30th day of June, 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977